

*a***MASTER STRIKE SDN BHD****v.****STERLING HEIGHTS SDN BHD***b*

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: P-02-1050-2001]
15 APRIL 2005

c

CONTRACT: *Sale and purchase of land - Breach - Purchaser failed to make balance of purchase price within time stipulated in agreement - Whether time of essence - Whether vendor had the right to terminate agreement and forfeit deposit paid*

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On 20 March 1997, the appellant as purchaser and the respondent as vendor executed a sale and purchase agreement ('agreement') for several pieces of land for a total purchase price of RM71,409,848.04. The appellant paid a 10% deposit of the total purchase price, *ie*, RM7,140,984.80 at the time of execution of the agreement. The balance of the purchase price was to be paid in two instalments, *ie*, 15% of the purchase price was payable within nine months

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on or before 19 December 1997 and the final balance of 75% of the purchase price was also payable on or before 19 December 1997. However, in respect of the latter payment the appellant had a right to extension of time of nine months with interest of 8%. The appellant failed to pay the aforesaid and the respondent terminated the agreement on 4 January 1998 forfeiting the deposit sum. The appellant filed an action in the High Court to declare the termination of the agreement null and void and for the return of the deposit sum. However, the learned judge dismissed the action with costs. Hence, this appeal. The main issue was whether the respondent was entitled to terminate the agreement and forfeit the deposit paid. The appellant contended that the respondent failed to cooperate with the appellant to enable the completion of the agreement. This was because the appellant failed to meet the requirements set by the appellant's lender bank that the respondent deliver the land titles concerned to the bank and create a lien-holder's caveat. It was alleged that the failure or refusal to consent to lodgment of a lien holder's caveat in favour of the bank for credit facilities granted to the appellant's associated company (which was not a party to the agreement) was a non-cooperation under cl. 30 of the agreement. The

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appellant also contended that time ceased to be the essence of the agreement as the appellant was negotiating with the respondent over the mode and time of payment in respect of the 15% of the total purchase price. Further, it would be just and equitable that the deposit be returned to the appellant. *a*

Held (dismissing the appeal)

Per Nik Hashim JCA delivering the judgment of the court: *b*

[1] Clause 24 was an entire agreement clause that constituted a binding agreement between the appellant and the respondent with regard to all matters mentioned in the contract and therefore the contract did not permit any term to be implied or import any other considerations not in the contract. (p 607 a) *c*

[2] There was no dispute on the provisions respecting payments under the agreement. In the event of default by the appellant to pay any sums payable, the respondent was entitled to terminate the agreement and forfeit the deposit as agreed liquidated damages. The deposit of 10% of the purchase price was not unusual in a contract for the sale of land. The fact that the amount of deposit was RM7,140,984.80 did not alter the position since 10% of the purchase price was normally a standard amount put as deposit. (p 608 b-c) *d*

[3] The respondent's refusal to consent for the creation of a lien-holder's caveat was justified. Clause 30 of the agreement, called by the appellant as a "good faith" clause, was confined to co-operation for doing acts or things authorised or permitted under the terms of the agreement and certainly did not extend to matters not provided for in the agreement. The clause did not mean that the respondent must do whatever to please the appellant even to the extent of exposing the respondent to loss and detriment. That the clause should be interpreted along the line of business common sense and customary practice as suggested by the appellant was not supported by authority. The agreement did not provide for the creation of a lien and by the omission in the agreement for such a lien, it was not open to the appellant to request for the creation of the lien. The only reference to security in the agreement was a charge. The terms in the agreement were exhaustive and mandatory in nature. It followed that the agreement should be interpreted strictly in accordance with its own terms. (p 608 f-h) *e*
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- a* [4] The creation of a lien was inharmonious with the express terms of cl. 4.3 of the agreement that the original document of titles and memorandum of transfer only be handed over to the appellant against the payment of the full purchase price and not earlier. Pending full payment of the purchase price, the respondent's solicitors were to hold the original titles as stakeholder. If the titles were delivered to the purchaser before full payment of the purchase price, *ie*, contrary to cl. 4.3, the respondent's solicitors would be in breach of their duty as stakeholder and exposed to liabilities. (p 609 a)
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- c* [5] It was true that there was nothing in the National Land Code to prohibit the creation of a third party lien holder's caveat. However, the appellant had not shown why the respondent should allow its land to be used as security under a lien when the respondent was not immediately paid the 15% and 75% of the purchase price. Further, the creation of a lien holder's caveat by way of third party security would prejudice the respondent. The respondent would be exposed to the unnecessary risk of parting with the titles concerned without payment of the balance of the purchase price. Accordingly, since a lien holder's caveat was not provided for in the agreement and was inconsistent with the express terms of the agreement nor was there any implied term to create a lien pleaded in the appellant's statement of claim, the issue of lien holder's caveat was wholly irrelevant. As such, there was nothing unreasonable in the respondent's conduct, in protecting its own position and its own land, to refuse to execute a lien holder's caveat. Further, the appellant's letter to the respondent even accepted the position that a lien holder's caveat could not be created. (pp 609 c-h & 610 a)
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- g* [6] The respondent never allowed any extension of time for payment but insisted on payment on the due date. The appellant's request for an extension of time to make payment because of the 'current economic slowdown' was rejected by the respondent. Economic slowdown is not a good reason for failing to pay the balance of a purchase price. Further, the appellant's witness testified that the appellant had the cash to make the 15% payment and yet the appellant failed to do so. Since the appellant confirmed that it had the money to pay, the respondent's alleged failure to cooperate to consent for the creation of a lien holder's caveat was irrelevant as it was the appellant who refused to make the said payment of 15% on the due date. Further, the learned judge found it as a fact that there was no extension of time granted or even negotiated. As such, the parties were bound by cl. 11 of the agreement that clearly stated that time was the essence of the contract. (pp 610 e-g & 611 a-b)
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- [7] Clause 27 of the agreement expressly provides that any variation to the agreement must be in writing. Until an agreement in writing was reached by the parties, all rights and obligations under the agreement remained valid and enforceable. In addition, cl. 32 of the same prevented the operation of waiver or acquiescence on the rights of the parties and that the parties were entitled to demand strict performance of the provisions of the agreement. (p 611 g-h) a
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- [8] Although the termination of the agreement took place 16 days after the due date, the respondent did not waive its rights with regard to payments on the due date under the agreement. Under cl. 33 of the agreement, failure or delay to exercise the right to forfeit immediately shall not affect or impair the respondent's right to forfeit. Hence, by the provision, the respondent's right to forfeit under the agreement was not lost by the delay. (p 612 b-c) c
- [9] The obligation to pay the purchase price was a fundamental obligation. Any breach for non-payment of the purchase price would go to the root of the agreement thereby rendering the agreement terminated and the deposit forfeited. As time was stipulated as of the essence, the respondent was entitled to forfeit the deposit on account of the appellant's breach to pay the balance of purchase price on time. The respondent was not required to prove that it had suffered any damage before it could forfeit the deposit. (p 612 d-f) d
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[Bahasa Malaysia Translation Of Headnotes]

Pada 20 Mac 1997, perayu sebagai pembeli dan responden sebagai penjual telah menandatangani suatu perjanjian jual beli ('perjanjian') bagi pembelian beberapa bidang tanah dengan harga RM71,409,848.04. Semasa perjanjian dimeterai, perayu membayar deposit sebanyak 10% dari harga belian, iaitu RM7,140,984.80. Untuk baki harga belian, ia perlu dilunaskan melalui dua pembayaran bertempoh, iaitu 15% harga belian harus dibayar dalam masa sembilan bulan pada atau sebelum 19 Disember 1997, sementara baki 75% juga perlu dijelaskan sebelum 19 Disember 1997. Bagaimanapun, berkaitan dengan pembayaran terkemudian, perayu diberikan lanjutan masa selama sembilan bulan dengan dikenakan faedah sebanyak 8%. Perayu gagal melunaskan bayaran-bayaran di atas dan pada 4 Januari 1998 responden menamatkan perjanjian dan merampas deposit. Perayu memfail tindakan di Mahkamah Tinggi bagi mengisytiharkan penamatan sebagai batal dan tak sah serta bagi mendapat kembali depositnya. Permohonan bagaimanapun ditolak oleh yang arif hakim dan perayu merayu. Isu utama adalah sama ada responden berhak untuk f
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- a* menamatkan perjanjian dan merampas deposit. Perayu menegaskan bahawa responden gagal bekerjasama dengannya bagi menyempurnakan perjanjian. Ini kerana perayu gagal memenuhi syarat-syarat yang ditetapkan oleh bank peminjam perayu bahawa responden harus menyerahkan hakmilik tanah-tanah berkenaan kepada bank bagi penyediaan kaveat pemegang lien. Ianya
- b* diujahkan bahawa kegagalan atau keengganan responden memberi persetujuan kepada pemasukan kaveat pemegang lien bagi manfaat bank bagi membolehkan syarikat bersekutu perayu mendapatkan kemudahan pinjaman adalah suatu bentuk ketidak-kerjasama di bawah fasal 30 perjanjian. Perayu juga menegaskan bahawa masa bukan lagi menjadi intipati perjanjian oleh kerana
- c* perayu sedang berunding dengan responden berkaitan cara dan masa membayar berhubung dengan 15% harga belian tersebut. Selain itu, adalah wajar dan adil bagi deposit dikembalikan kepada perayu.

Diputuskan (menolak rayuan)

Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

- d* [1] Fasal 24 adalah fasal keseluruhan perjanjian dan menjadi perjanjian yang mengikat di antara perayu dan responden mengenai semua perkara yang disebut di dalam kontrak. Kerana itu kontrak tidak membenarkan sebarang pensiratan terhadap mana-mana termannya dan tidak menerima mana-mana pertimbangan yang tidak tertera di dalam kontrak.
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- f* [2] Di bawah perjanjian, tidak ada pertikaian tentang peruntukan-peruntukan mengenai pembayaran. Jika berlaku kemungkiran di pihak perayu untuk membayar apa-apa jumlah yang perlu dibayar, responden berhak untuk menamatkan perjanjian dan merampas deposit sebagai gantirugi jumlah tertentu. Deposit 10% dari harga belian bukanlah sesuatu yang luar biasa dalam kontrak penjualan tanah. Fakta bahawa deposit berjumlah RM7,140,984.80 tidak mengubah kedudukan oleh kerana 10% dari harga belian adalah jumlah biasa yang diletak sebagai deposit.
- g* [3] Keengganan responden untuk memberi persetujuan kepada pembentukan kaveat pemegang lien adalah wajar. Fasal 30 perjanjian, yang dipanggil fasal “suci hati” oleh perjanjian, adalah terhad kepada kerjasama bagi melakukan kerja-kerja atau perbuatan-perbuatan yang dibenarkan di bawah terma-terma perjanjian dan pastinya tidak menjangkau kepada perkara-perkara yang tidak diperuntukkan di dalam perjanjian. Fasal tersebut tidak bermakna bahawa responden harus berbuat apa sahaja bagi memuaskan perayu, hatta sehingga menjejaskan responden sendiri. Bahawa fasal itu harus ditafsirkan menurut jalur akal budi perniagaan dan amalan-amalan biasa tidak disokong oleh autoriti-autoriti. Perjanjian tidak membuat peruntukan tentang penciptaan lien, dan dengan ketiadaan peruntukan
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- tersebut, ianya tidak terbuka kepada perayu untuk meminta supaya suatu lien diciptakan. Satu-satunya rujukan kepada jaminan di dalam perjanjian adalah gadaian. Terma-terma di dalam perjanjian adalah bersifat menyeluruh dan mandatori. Ianya mengikut bahawa perjanjian harus ditafsir dengan secara ketat berdasarkan terma-termannya yang tersendiri. a
- [4] Penciptaan lien tidak seiring dengan terma tegas fasal 4.3 perjanjian yang menyatakan bahawa dokumen asal hakmilik dan memorandum pindahmilik akan hanya diserahkan kepada perayu setelah pembayaran penuh harga belian dan tidak sebelumnya. Sementara menunggu pembayaran penuh harga belian, peguamcara responden akan memegang suratan hakmilik asal sebagai pemegang taruhan. Jika hakmilik diserahkan kepada pembeli sebelum pembayaran penuh dibuat, yang bertentangan dengan kehendak fasal 4.3, maka peguamcara responden akan melanggar tanggungjawabnya sebagai pemegang taruhan dan terdedah kepada liabiliti-liabiliti. b
- [5] Memang benar bahawa tiada apa-apapun di dalam Kanun Tanah Negara yang menghalang penciptaan kaveat pemegang lien pihak ketiga. Bagaimanapun, perayu tidak memberi sebab mengapa responden harus membenarkan tanahnya dijadikan jaminan di bawah suatu lien sedangkan responden tidakpun dibayar 15% dan 75% harga belian tersebut. Selain itu, penciptaan kaveat pemegang lien melalui jaminan pihak ketiga akan memprejudiskan responden. Responden akan terdedah kepada risiko berpisah dengan hakmilik-hakmilik berkenaan tanpa mendapat bayaran baki harga belian. Dengan itu, oleh kerana kaveat pemegang lien tidak diperuntukkan di dalam perjanjian dan tidak konsisten dengan terma-terma ekspres perjanjian, dan oleh kerana tiada sebarang terma tersirat bagi mencipta lien seperti yang diplidkan di dalam penyata tuntutan perayu, maka isu kaveat pemegang lien adalah sama sekali tidak relevan. Oleh itu, tiada apa-apa yang tidak munasabah pada kelakuan responden dalam enggan memeterai kaveat pemegang lien, demi melindungi tanah serta kedudukannya. Lagipun, melalui suratnya kepada responden, perayu telah menerima hakikat bahawa kaveat pemegang lien sememangnya tidak boleh diciptakan. c
- [6] Responden tidak pernah memberikan lanjutan masa untuk pembayaran, sebaliknya sentiasa menuntut supaya pembayaran dibuat mengikut masa yang ditetapkan. Permintaan perayu untuk perlanjutan masa untuk membayar disebabkan 'kemelesetan ekonomi semasa' telah ditolak oleh responden. Kemelesetan ekonomi bukanlah satu alasan kukuh bagi kegagalan membayar baki harga belian. Selain itu, saksi perayu menyatakan bahawa perayu mempunyai kecairan tunai untuk membuat bayaran 15% d
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- a* tetapi tidak berbuat demikian. Oleh kerana perayu telah mengesahkan bahawa ia memang mempunyai wang untuk membuat pembayaran, maka dakwaan bahawa responden gagal memberi persetujuan kepada penciptaan kaveat pemegang lien sudah tidak relevan lagi kerana perayulah yang sebenarnya gagal membuat pembayaran sebanyak 15% pada tarikh yang ditetapkan.
- b* Lagipun, yang arif hakim telah membuat dapatan fakta bahawa tidak ada lanjutan masa telah diberi atau dirundingkan. Oleh itu, pihak-pihak adalah terikat dengan fasal 11 perjanjian yang menyatakan dengan jelas bahawa masa adalah intipati perjanjian.
- c* [7] Fasal 27 perjanjian dengan tegas menyatakan bahawa sebarang variasi pada perjanjian hendaklah dibuat secara bertulis. Sehingga suatu perjanjian bertulis sedemikian dicapai oleh pihak-pihak, kesemua hak-hak dan obligasi di bawah perjanjian adalah sah dan berkuatkuasa. Di samping itu, fasal 32 perjanjian menghalang penggunaan penepian (waiver) atau akuiesens hak-hak pihak-pihak dan pihak-pihak juga berhak menuntut pelaksanaan ketat peruntukan-peruntukan perjanjian.
- d*
- e* [8] Walaupun penamatan perjanjian berlaku 16 hari selepas tarikh luput, responden tidak mengeneipkan haknya berkaitan dengan pembayaran pada tarikh yang ditetapkan di bawah perjanjian. Di bawah fasal 33 perjanjian, kegagalan atau kelengahan untuk melaksanakan hak untuk merampas dengan serta merta tidak menjejaskan atau melemahkan hak responden untuk merampas. Oleh itu, hak responden untuk merampas di bawah perjanjian tidak hilang disebabkan oleh kelengahan.
- f* [9] Obligasi untuk membayar harga belian adalah merupakan obligasi fundamental. Sebarang kemungkiran kerana gagal membayar harga belian akan menjejaskan akar umbi perjanjian sekaligus menyebabkan perjanjian menjadi tamat dan deposit terampas. Oleh kerana masa menjadi intipati, responden berhak merampas deposit disebabkan kegagalan perayu membayar pada masa yang ditetapkan. Responden tidak perlu membuktikan bahawa ia telah mengalami kerugian sebelum boleh merampas deposit.
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Case(s) referred to:

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA (*refd*)

Delta Enterprises Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor [2005] 1 CLJ 501 CA (*refd*)

h *Highceed Corp Sdn Bhd v. Warisan Harta Sabah Sdn Bhd & Anor* [2000] 5 MLJ 337 (*refd*)

Innterpreneur Pub Co v. East Crown Ltd [2000] 3 EGLR 31 (*refd*)

Linggi Plantations Ltd v. Jagatheesan [1972] 1 MLJ 89 (*refd*)

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Llyod v. Llyod [1837] 2 My & Cr 192 (**refd**) a
Macronet Sdn Bhd v. RHB Bank Sdn Bhd [2002] 4 CLJ 729 HC (**refd**)
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC (**refd**)
Re Hong Huat Realty (M) Sdn Bhd [1987] 1 MLJ 502 (**refd**)
Siah Kwee Mow & Anor v. Kulim Rubber Plantations Ltd [1979] 2 MLJ 190 (**refd**)
Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd [1987] 2 CLJ b
423; [1987] CLJ (Rep) 345 SC (**refd**)
Union Eagle Ltd v. Golden Achievement Ltd [1997] 2 All ER 215 (**refd**)
Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (**dist**)

For the appellant - Logan Sabapathy (Ooi Huey Miin with him); M/s Logan Sabapathy
For the respondent - RR Sethu (Chuah Chong Ewe with him); M/s Ng & Anuar c

[Appeal from High Court, Pulau Pinang; Civil Suit No: MT1-22-834-1998]

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim JCA: d

Background

This appeal arose out of a sale and purchase agreement relating to several pieces of land in Sungai Petani which agreement was executed on 20 March 1997 between the appellant (plaintiff in the court below) as purchaser and the respondent (defendant in the court below) as vendor for a consideration of RM71,409,848.04. At the time of the execution of the said agreement, a sum of RM7,140,984.80 being 10% of the total purchase price, was paid by the appellant by way of deposit and to account of the total purchase price. The receipt of the said sum was acknowledged by the respondent under cl. 2.1(a) of the agreement. Under cl. 2.(1)(b) of the agreement, the balance of the purchase price were to be settled in two trances as follows: e

- (i) 15% of the purchase price, ie, RM10,711,477.20 was payable within nine months on or before 19 December 1997; and f
- (ii) final balance of 75% of purchase price ie, RM53,557,386.04 was payable on or before 19 December 1997 but the appellant has a right to extension of time of nine months for this payment upon payment of interest at 8%. g

The appellant failed to pay RM10,711,477.20 on 19 December 1997 nor the said RM53,557,386.04. On 4 January 1998 the respondent terminated the agreement and forfeited the deposit of RM7,140,984.80. The appellant filed a writ in the High Court applying for a declaration that the termination of the said agreement by the respondent was null and void, and the forfeited money of RM7,140,984.80 to be returned to the appellant with interest. On 29 October h

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- a* 2001 the learned judge dismissed the appellant's application with costs. In his judgment the learned judge found that the appellant had failed to pay the sum of RM10,711,477.20 due on or before 19 December 1997 as required under cl. 2.1(b)(i) of the agreement, and that under cl. 4.3, the respondent was to hand over the documents of titles only against payment of the entire purchase price. He was of the view that the time did not cease to be of the essence of the contract and that the termination of the contract and forfeiture of the deposit were not unconscionable or inequitable. Hence, this appeal.
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Issue & Contentions

- c* The primary issue here is whether the respondent was entitled to terminate the contract and forfeit the deposit.

The contentions of the appellant broadly cover three areas, namely:

- d* (a) the respondent had failed to co-operate with the appellant to enable the completion of the contract in that the appellant had failed to meet the requirements set by the appellant's lender Maybank that the respondent was to deliver the land title to Maybank and create a lien-holder's caveat. The appellant alleged that the failure or refusal by the respondent to consent to lodgment of a lien-holder's caveat on the land in favour of Maybank for facilities granted to the appellant's associated company
- e* Country Heights Industries Sdn Bhd which was not a party to the sale agreement, is a non co-operation under cl. 30; and
- f* (b) the time had ceased to be of the essence of the contract as the appellant was negotiating with the respondent over the mode and time of payment of RM10,711,477.20.
- (c) the conduct of the respondent was such that it would be just and equitable for the deposit to be returned to the appellant.

- g* It is the contentions of the respondent that there was no provision in the agreement for the creation of a lien-holder's caveat and that such a caveat was inconsistent with the express terms of the agreement. The respondent was of the view that the creation of a lien-holder's caveat, by way of third party security, was unauthorized by law. With regard to time, the respondent argued that time had not ceased to be the essence of the contract as the respondent did not enter into any negotiation with the appellant but it was the appellant
- h* who wanted to meet the respondent. Further, in the circumstances of this case, the respondent's conduct was not unconscionable, and therefore, the deposit was rightly forfeited.

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Clauses

Since the interpretations of certain clauses in the agreement are crucial in arriving at a decision in this appeal, the relevant clauses are reproduced below:

Memorandum Of Transfer

4.1 (a) – (f)

4.2 (i) – (iv)

4.3 Upon the execution of the Agreement, the Vendor shall utilise the Deposit paid pursuant to clause 2.1(a) hereof to redeem the said Property from Hongkong Bank Malaysia Berhad, and thereafter, but not later than three (3) months from the date of this Agreement, the Vendor shall deposit the original of the Documents of Titles for each of the lots comprising the said Property with the Vendor's Solicitors as Stakeholder. *Upon full payment of the Total Purchase Price, the Vendor's solicitors are authorized to and shall forward the original Documents of Titles for each of the lots comprising the said Property to the Purchaser's Solicitors.* If the Vendor fails to deliver the original Documents of Titles to the Vendor's Solicitors as Stakeholder, then the obligation of the Purchaser to pay the Balance of the Total Purchase Price under clause 2.1(b) shall be suspended until such time as the Vendor shall have delivered the original of Documents of Titles to the Vendor's Solicitors.

Default By The Purchaser

6. If the purchaser fails neglects or omits to pay any sums payable under cl. 2.1 herein or any part thereof within the time stipulated herein, the vendor shall be entitled forthwith to terminate this agreement and in such an event:

(i) Vendor shall be entitled to deal with or otherwise dispose of the said Property in such manner and upon such conditions as the vendor shall deem fit as if this agreement had not been entered into; and

(ii) any payment paid by the purchaser hereunder shall be dealt with and disposed of as follows:

(a) firstly a sum equivalent to ten per centum (10%) of the purchase price shall be forfeited absolutely by the vendor as agreed liquidated damages:

(b) – (c)

a **Time**

11. Time whenever mentioned shall be of the essence of this contract.

24. Entire Agreement

This Agreement:

b constitutes the entire agreement and understanding between the parties with respect to the matters dealt with in this agreement;

c supersedes any other agreement, letters correspondence (oral or written or expressed or implied) entered into prior to this agreement; and

was not entered into by the parties in reliance of any agreement, undertaking, warranty or representation of any party not expressly contained or referred to in this agreement.

27. Amendments and Additions

d No amendment, variation, revocation, cancellation, substitution or waiver of or addition or supplement to, of any of the provisions of this Agreement shall be effective unless it is in writing and signed by the parties.

30. General Covenant

e Each party has entered into this agreement in good faith and shall give all such assistance and information to the other party and execute and do and procure all other necessary person or companies, if any, to execute and do all such further acts, deeds, assurance and things as may be reasonably required so that full effect may be given to the terms and conditions of this agreement.

32. Knowledge & Acquiescence

f Knowledge or acquiescence by any party of or in any breach of any of the provisions of this agreement shall not operate as or be deemed to be a waiver of such provisions and notwithstanding such knowledge or acquiescence, such party shall remain entitled to exercise its rights and remedies under this agreement and at law and to require strict performance of all of the provisions of this agreement.

33. Right And Remedies

g The rights and remedies provided in this agreement are cumulative, and are not exclusive of any rights or remedies of the parties provided at law and no failure or delay in the exercise or the partial exercise of any such right or remedy or the exercise of any other right or remedy shall affect or impair any such right or remedy.

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Findings

Clause 24 is an entire agreement clause that constitutes a binding agreement between the appellant and the respondent with regard to all the matters mentioned in the contract and therefore, in our judgment, the contract does not permit any term to be implied or import any other considerations not in the contract. In *Innterpreneur Pub Co v. East Crown Ltd* [2000] 3 EGLR 31 at p. 32 K-L right a somewhat similar provision to cl. 24 is set out. In his judgment, Lightman J opined on the purpose and the effect of an entire agreement where at p. 33 A-B left he said:

The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.

In that case, the learned judge ruled that evidence of a collateral contract was inadmissible. He further added at p. 33 D left:

... the formula used is abbreviated to an acknowledgment by the parties that the agreement constitutes the entire agreement between them. That formula is, in my judgment, amply sufficient to constitute an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement and nowhere else. That can be the only purpose of the provision.

The principle on the entire agreement clause in *Innterpreneur Pub* was followed by Abdul Aziz J (as he then was) in *Macronet Sdn Bhd v. RHB Bank Sdn Bhd* [2002] 4 CLJ 729. There he ruled that the entire agreement clause precluded variation by oral agreement. At p. 740 the learned judge said:

My opinion is simply this. The entire agreement clause was an agreement between the plaintiffs and the defendants. In agreeing to the clause, the parties must be presumed to have known of the existence of s. 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt

- a* can only be made through the exceptions in s. 92. By agreeing, therefore, to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s. 92. They cannot, therefore, be allowed to prove the second precontractual representation or the oral agreement and to rely on them.

- b* It is pertinent to note that there is no dispute on the provisions respecting payments under cl. 2.1 of the agreement, and in the event of default by the appellant to pay any sums payable under cl. 2.1, the respondent is entitled under cl. 6 to terminate the agreement and forfeit the deposit as agreed liquidated damages. The deposit in the instant case is 10% of the purchase price and the percentage is not unusual in a contract for the sale of land.
- c* The fact that the amount of deposit is RM7,140,984.80 does not alter the position since 10% of the purchase price is normally a standard amount put as deposit. Lord Hailsham LC said in *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89:

- d* There is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land.

- e* It is common ground that the appellant paid the deposit of 10% and the subsequent payment of RM10,711,477.20 was not paid on or before 19 December 1997 by the appellant. Both parties held each other in breach of the agreement and treated the agreement at an end save for the issue of whether the deposit was rightly forfeited or should be refunded.

Lien-Holder's Caveat

- f* With regard to the respondent's refusal to consent for the creation of a lienholder's caveat in favour of Maybank, we are of the view that in the circumstances of this case, the refusal was justified. Clause 30 of the agreement which the appellant called a "good faith" clause, is confined to co-operation for doing acts or things authorized or permitted under the terms set out in the agreement and certainly does not extend to matters not provided for in the agreement. The clause does not mean that the respondent must do whatever to please the appellant even to the extent of exposing the respondent to loss and detriment. The interpretation of the clause along the line of business common sense and customary practice as suggested by the appellant are not supported by authority. The agreement does not provide for the creation of a lien and by the omission in the agreement for such a lien, it is not open to the appellant to request for the creation of the lien. The only reference to security in the agreement is a charge. The terms in the agreement are exhaustive and mandatory in nature. It follows that the court has no alternative but to interpret the agreement strictly in accordance with its own terms.

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The creation of a lien is also inharmonious with the express terms of cl. 4.3 of the agreement that the original document of titles and memorandum of transfer only be handed over to the appellant against the payment of the full purchase price, and not earlier. Pending full payment of the purchase price, the respondent's solicitors shall hold the original titles as stakeholder. If the titles are delivered to the purchaser before full payment of the purchase price ie, contrary to cl. 4.3, then the respondent's solicitors shall be in breach of their duty as stakeholder and shall be exposed to liabilities.

The appellant contends that there is nothing in the National Land Code (NLC) to prohibit the creation of third party lien-holder's caveat. Whilst it is true that there is no prohibition as such in the NLC, but, quite apart from the absence of an obligation relating to the lien-holder's caveat in the agreement, the plaintiff had not shown why the respondent should allow its land to be used as security under a lien to the appellant to finance the commercial operations of the appellant and or its associated company, Country Heights Industries Sdn Bhd, when the respondent was not immediately paid the 15% and 75% of the purchase price.

Further, the creation of a lien-holder's caveat, by way of third party security, would prejudice the respondent. The lender Maybank in return for an offer of a credit facility of RM80m to Country Heights Industries Sdn Bhd in its letter dated 30 August 1997 at p. 285 of the appeal record, required a lien-holder's caveat from the respondent pending the creation of a charge by the appellant. Pending the creation of the charge, the respondent's land becomes security for the loan to Country Heights Industries Sdn Bhd. The respondent would not be paid the 15% and 75% of the purchase price immediately but would be paid according to the terms stipulated in the agreement even though the full loan sum was released to and used by Country Heights Industries Sdn Bhd. The facility far exceeded the purchase price. The obvious risk is that in the event of default by Country Heights Industries Sdn Bhd, the respondent's land would be sold and the respondent would not be paid the balance of the purchase price. Thus, the respondent would be exposed to unnecessary risk of parting with the titles without the payment.

Consequently, we agree with the respondent's stand that since a lien-holder's caveat is not provided for in the agreement and is inconsistent with the express terms of the agreement, nor is there any such implied term to create a lien pleaded in the appellant's statement of claim, the issue of lien-holder's caveat is wholly irrelevant in the present case. Therefore, there was nothing unreasonable in the respondent's conduct in protecting its own position and

- a* its own land to refuse to execute a lien-holder's caveat. The appellant, through Tan Sri Lee Kim Yew's letter dated 2 January 1998 (at p. 379 record of appeal) to the respondent even accepted the position that a lien-holder's caveat cannot be created.

Time

- b* We now deal with the question of time. The appellant claimed that there were negotiations and therefore without reinstating time to be of the essence by giving the appellant reasonable notice to complete the purchase, the respondent ran foul of the principle in *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 where Raja Azlan J (as he then was) at p. 247 G right said:

- c* Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid ...

- d* And at p. 248 C left His Lordship continued:

It would therefore be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce his strict legal rights against the plaintiff which he had been led to believe would not be enforced against him.

- e* The facts in that case are readily distinguishable, and therefore, it follows that the principle therein is not applicable to the present case. Unlike in that case, the respondent here never allowed any extension of time for completion but insisted on payment on the due date. The respondent by letter dated 15 November 1997 reminded the appellant that the 15% payment was due on 19 December 1997. The appellant by letter dated 15 December 1997 sought an extension of time to pay due to the "current economic situation" but the request was rejected by the respondent in its letter dated 16 December 1997. It is to be noted that economic slowdown is not a good reason for failing to pay the balance of purchase price. Further, in the present case, the appellant's witness, SP2 in his testimony, maintained that the appellant had the cash to pay the 15% payment on 19 December 1997 and yet the appellant did not pay. Since the appellant confirmed that it had the money to pay, the alleged failure on respondent to co-operate to consent for the creation of a lien-holder's caveat is therefore irrelevant as it is the appellant who refused to pay the 15% of the purchase price on the due date.
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The importance of time with regard to payment of purchase price needs no emphasis. If emphasis is still needed we can do no better than to refer to the Privy Council case in *Union Eagle Ltd v. Golden Achievement Ltd* [1997] 2 All ER 215 where it was held that a 10-minute delay in tendering the purchase money on account of traffic congestion was fatal. In the instant case, the learned judge found as a fact that there was no extension of time granted or even no negotiation for extension of time. As such, the parties were bound by cl. 11 of the agreement which states very clearly that time shall be of the essence of the contract.

The learned judge also found as a fact that there was no negotiation between the parties. The meeting on 2 January 1998 was initiated and requested by the appellant and Tan Sri Lee Kim Yew, the only person who spoke on behalf of the appellant at the meeting, had chosen not to testify in this proceeding. On the other hand, SD2 the only person who spoke on behalf of the respondent, testified that there was no negotiation whatsoever and at the commencement of the meeting, SD2 had made clear to Tan Sri Lee Kim Yew and the appellant that the respondent's representative had no mandate or power to negotiate. This is what the learned judge said on the meeting at pp. 7-8 of his judgment:

Menurut surat dimukasurat 123 ABD mesyuarat pada 2.1.1998 telah diminta oleh Plaintiff dan diakui oleh SP1 semasa perbicaraan. Mesyuarat ini tidak menghasilkan sebarang rundingan, malahan wakil defendan tiada mandate untuk membuat sebarang keputusan. Saya telah meneliti surat plaintiff bertarikh 2.1.98 mengenai rundingan di mesyuarat itu. Saya dapati wakil plaintiff yang bercakap. Wakil defendan hanya mendengar. Wakil plaintiff menerangkan tentang lienholder's caveat. Wakil defendan mendengar sahaja. Pada pendapat saya dalam keadaan sedemikian defendan bukan merundingkan untuk melanjutkan tempoh pembayaran baki harga belian.

Thus, on the facts, the learned judge was correct to conclude that there was no negotiation.

Furthermore, cl. 27 of the agreement expressly provides that any variation to the agreement must be in writing. Until an agreement in writing is reached by the parties, all rights and obligations under the agreement remain valid and enforceable. The meeting on 2 January 1998 did not result in any agreement in writing, hence the provisions of the agreement remained intact and unaltered. Besides, cl. 32 prevents the operation of waiver or acquiescence on the rights of the parties; and that the parties are entitled to demand strict performance of the provisions of the agreement.

a Termination

On the question of termination, the appellant complained that the respondent did not terminate the agreement immediately, but allowed the date of 19 December 1997 to pass and participated in the meeting of 2 January 1998. And as such, there would have been a clear need to fix a new date for payment.

b With respect, we do not agree with the appellant. We agree with the respondent that there is no need for immediate termination. The termination of the agreement took place on 4 January 1998, ie, 16 days after the due date 19 December 1997. On the evidence, there was no waiver by the respondent on its rights with regard to the payments on the due date under the agreement. **c** Under cl. 33, failure or delay to exercise the right to forfeit immediately shall not affect or impair the respondent's right to forfeit. Hence by the provision, the respondent's right to forfeit under the agreement is not lost by the delay.

d Forfeiture

The obligation to pay the purchase price is a fundamental obligation. The Court of Appeal in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287:

e In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is fundamental.

Thus, any breach for non payment of the purchase price shall go to the root of the agreement thereby rendering the agreement terminated and the deposit forfeited (*Siah Kwee Mow & Anor v. Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190). In the instant case, where time was stipulated as of the essence, **f** the respondent was entitled to forfeit the deposit on account of the appellant's breach to pay the balance of purchase price on time. (see *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 CLJ 423; [1987] CLJ (Rep) 345).

g It is therefore irrelevant in the present case how the appellant made its arrangements to pay the purchase price. The purchase price must be paid on schedule. The economic slowdown is not relevant and does not excuse the breach of fundamental obligations to pay the balance of purchase price. Such events do not provide a basis for relief (see *Re Hong Huat Realty (M) Sdn Bhd* [1987] 1 MLJ 502 at p 507; *Highceed Corp Sdn Bhd v. Warisan Harta Sabah Sdn Bhd & Anor* [2000] 5 MLJ 337). So, the appellant's failure to pay **h** the 15% of the purchase price was clearly a breach of contract entitling the respondent to forfeit the deposit. The deposit in the instant case was 10% of the purchase price. Such sum is a reasonable sum and is not an unconscionable

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amount. The respondent was not required to prove that it had suffered any damage before it could forfeit the deposit (*Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23).

The clauses in the sale and purchase agreement are complete and unambiguous in their terms that there can be no other construction possible then the one which was held by the learned judge. Lord Cottenham LC in *Llyod v. Llyod* [1837] 2 My. & Cr. 192, 202 once said: "If the provisions are clearly expressed, and there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail." (see *Delta Enterprises Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd & Anor* [2005] 1 CLJ 501; [2005] 2 AMR 297).

It is our judgment that on a proper reading of the various clauses of the agreement and the evidence tendered in court, the agreement was lawfully terminated, and the RM7,140,984.80 being 10% of the purchase price, is a true deposit and was validly and properly forfeited by the respondent. The respondent was not in breach of the agreement; neither it was guilty of any unconscionable conduct. The learned judge was right in dismissing the appellant's claim. The appeal is accordingly dismissed with costs and the deposit be paid to the respondent to account of taxed costs.

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